# No. 21,629

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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STEWART L. UDALL, Secretary of the Interior, STATE OF ALASKA,
*Appellants,*

vs.

ANDREW J. KALERAK, JR., et al.,
*Appellees.*

**On Appeal from the United States District Court, District of Alaska**

## SUPPLEMENT TO BRIEF FOR APPELLANT STATE OF ALASKA

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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### STATEMENT OF THE CASE, continued

The Secretary of the Interior decided that the lands covered by the State selection were not open to the initiation of claims by settlement or location and that all attempts by appellees to do so were invalid in light of the long-standing principle of segration. (R. 18.)

Second, the Secretary decided that sound administrative and equitable considerations in view of the Interior Department's internal management and the broad Congressional policy implemented by the 90 day preference right provision of the Alaska Statehood Act (72 Stat. 339) led to the conclusion that Alaska's application, although premature, should be accepted. (R. 25.)

The United States District Court at Anchorage, after dutifully finding that the Secretary's decision was arbitrary, capricious, in excess of statutory right and without observance of procedure required by law, etc., reversed. This appeal followed.

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## SPECIFICATIONS OF ERROR

I

The District Court Erred in Holding That the Prima Facie Valid Application of the State of Alaska Which Remained of Record, Did Not Segregate the Land in Question from Subsequent Appropriation.

II

The District Court Erred in Reversing the Decision of the Secretary of the Interior that the Amendments Filed by the State During Its Statutory Preference Right Period Were the Equivalent of Refiling the Original Application.

III

The District Court Erred in Reversing the Decision of the Secretary of the Interior that the State's Original Application Could Be Accepted.

Respectfully submitted,
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**(Appendices A and B Follow)**

# Appendices A and B

## Appendix A

United States
Department of the Interior
Office of the Secretary
Washington, D.C. 20240

| | |
|---|---|
| A-30518 | : Anchorage 058566, 062515 |
| State of Alaska | : State selection rejected |
| Andrew Kalerak, Jr. | : Reversed |

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Alaska has appealed to the Secretary of the Interior from a decision dated July 20, 1965, of the Chief, Office of Appeals and Hearings, Bureau of Land Management, rejecting in part its selection application Anchorage 058566 and reversing a decision dated June 9, 1965, of the Anchorage district and land office refusing to accept for recordation a notice of location of a settlement, Anchorage 058566, submitted by Andrew Kalerak, Jr., for lands in conflict with the State's selection.

In addition, Ray W. McCubbins and 10 others have also appealed to the Director of the Bureau of Land Management from letter decisions of the Anchorage district and land office refusing to accept their respec-

tive notices of settlement or occupancy claims.[1] Because in our view the legal issue governing the disposition of the case on appeal to the Secretary is the same as that in the cases on appeal to the Director, they will be considered and decided with the pending appeal.[2]

The lands selected by the State, a small part of which is also sought by the individual applicants, cover approximately 20,000 acres in Ts. 11 and 12 N., Rs. 1 and 2 W., Seward Meridian, Alaska, most of which had been withdrawn by paragraph (4) of Public Land Order No. 576 of March 29, 1949, 14 F.R. 1614, from all forms of appropriation for the protection of the water supply of the City of Anchorage.

The attempt to transfer the selected lands from the Federal Government to the State began, apparently,

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[1]The names of the applicants, serial numbers, and type of claim are as follows:

| | Anchorage | | Date Received |
|---|---|---|---|
| Ray W. McCubbins | 062524 | Homestead | May 28, 1965 |
| Lawrence McCubbins | 062558 | Homestead | June 7, 1965 |
| *Carl B. Fiscus | 062609 | Homestead | June 7, 1965 |
| Lawrence J. Wolfgram | 062614 | Trade & Mfg. Site | June 11, 1965 |
| Lawrence J. Wolfgram | 062622 | Homestead | June 14, 1965 |
| Ronald L. Thiel | 062624 | Trade & Mfg. Site | June 14, 1965 |
| Ronald L. Thiel | 062625 | Homestead | June 14, 1965 |
| Armand C. Sipielman | 062627 | Homestead | June 15, 1965 |
| Arvil Gary Taylor | 062629 | Homestead | June 15, 1965 |
| Gerald Baxter | 062639 | Homestead | June 16, 1965 |
| C. H. Trombley | 062649 | Homestead | June 17, 1965 |

*Fiscus filed a relinquishment of his claim on December 6, 1965.

[2]The Secretary of the Interior may in the exercise of his supervisory authority assume jurisdiction over a case pending on appeal before the Director of the Bureau of Land Management without awaiting a decision by the Director and a subsequent appeal from that decision. *Public Service Company of New Mexico*, 71 I.D. 427 (1964); *U. S. v. M. V. Browning, Administrator,* 68 I.D. 183 (1961).

with a request of March 8, 1962, of the City of Anchorage to the Anchorage land office that these lands be withdrawn for watershed purposes for the protection of the city's water supply. In a letter dated September 28, 1962, to the State Division of Lands, the State office of the Bureau of Land Management said that the city was not a proper applicant for a withdrawal and that most of the land it desired was already withdrawn or otherwise segregated. It then offered as a suggestion for placing the lands in State or local ownership that the State file a blanket selection for the withdrawn lands with an assurance that the selected lands would be classified for watershed purposes. The Bureau would then, the letter continued, request revocation of paragraph (4) of P.L.O. 576 and, when that was done, the State selection would become effective immediately.

The Director of the State Division of Lands informed the land office on January 8, 1963, that the suggested plan was agreeable to the State and the city. On the same day the State filed a formal selection application, A-058566, pursuant to section 6(b) of the act of July 7, 1958, 72 Stat. 739, 48 U.S.C. pp. 9025, 9026,[3] for 26,880 acres of public land.[4]

---

[3]Section 6(b) granted to the State and entitled it to select not more than 102,550,000 acres from the public lands which are "vacant, unappropriated, and unreserved at the time of their selection."

[4]In the next 14 months the State filed four amendments adding tracts of various sizes to its selection application. April 8, 1963—950 acres; May 24, 1963—640 acres; March 13, 1964—3,777 acres; March 17, 1964—certain lands restored by P.L.O. 314, 29 F.R. 1327.

In accordance with the regular practice the State's selection was posted in the appropriate land and status records.

On April 8, 1963, the Department issued P.L.O. 3022, 28 F.R. 3661, revoking the withdrawal made by paragraph (4) of P.L.O. 576, *supra*. The order also provided:

> "3. Subject to any existing valid rights and the requirements of applicable law, the public lands are hereby opened to settlement and to filing of such applications, selections, and locations as are allowable on unsurveyed lands in accordance with the following:
>
> a. Until 10:00 a.m. on July 8, 1963, the State of Alaska shall have a preferred right to select the lands in accordance with provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 CFR Part 76.
>
> b. All other valid applications and selections under the nonmineral public land laws including applications and offers under the mineral leasing laws for those lands described in Paragraph 1 hereof, presented at or prior to 10:00 a.m. July 8, 1963, will be considered as simultaneously filed at that hour. Rights under such applications and selections filed after that hour will be governed by the time of filing.
>
> 4. Persons claiming preference rights based upon valid settlement, statutory preference, or equitable claims must enclose properly corroborated statements in support of their applications, setting forth all facts relevant to their claims.

> 5. The lands will be subject to the operation of the public land laws generally, including location under the United States mining laws, beginning at 10:00 a.m. on July 8, 1963. The lands described in Paragraph 2 hereof, have been open to applications and offers under the mineral leasing laws.
>
> Inquiries concerning the lands should be addressed to the Manager, Land Office, Bureau of Land Management, Anchorage, Alaska."[5]

On October 8, 1964, the land office issued a decision directing that the State publish a notice of its application in an Anchorage newspaper for five consecutive weeks.[6]

The publication was carried out within the time allowed, the notice stating:

> "Notice is also given that the above described lands have, since these dates [the dates on which the original application and amendments were filed], been segregated from all applications and appropriations under the public land laws, in-

---

[5]Section 6(g) of the act of July 7, 1958, *supra*, states in part: "The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act * * *."

[6]The decision stated:

"* * * The selected lands are of a class subject to selection under the Act [sec. 6(b) of the act of July 7, 1958, *supra*] * * *.

"The selected lands are now segregated from all appropriations under the public land laws. This segregation will automatically terminate unless the State publishes first notice of its application within 60 days of receipt of this decision (43 CFR 76.16) [now 43 CFR 2013.9.4]."

> cluding settlement under the homestead and similar laws and locations under the mining laws. Settlements and locations initiated on or after these dates are null and void."

About 7 months after first publication, Andrew Kalerak, Jr., on May 27, 1965, filed a Notice of Location of Settlement or Occupancy Claim in Alaska, stating that he had made a settlement under the homestead laws on May 26, 1965, on unsurveyed lands which would probably be the NW¼ sec. 19, T. 12 N., R. 2 W., S.M., Alaska. Kalerak completed Item 5 of the form, which begins: "Improvements on the lands * * *," by inserting: "None, when I settled. I have staked each corner, marked the boundaries, post [sic] the land with a copy of this notice, and placed cement blocks on the land for a start of a foundation."

On June 9, 1965, by a letter-decision the land office held that Kalerak's location notice was unacceptable for recordation because the lands described in his claim were included in a valid selection by the State and therefore were segregated from all applications and appropriations under the public land laws. On appeal, the Office of Appeals and Hearings rejected the State's selection application insofar as it includes lands described in paragraph (4) of P.L.O. 576, *supra,* and reversed the land office decision insofar as it refused to accept the notice of location for recording.

The decision held that on the date that the State filed its original selection application the land described in paragraph (4) of P.L.O. 576, *supra,* was

still withdrawn, that section 6(b) of the act of July 7, 1958, permits selections only from vacant, unappropriated and unreserved land, that on the filing date these lands were not eligible for selection, and that an application filed while land is withdrawn is invalid. The restoration of the lands by P.L.O. 3022, *supra,* it continued, was not effective retroactively, and when the State did not file a new application, or amend its original application to select the lands after they had been restored either during the preference period or thereafter, the lands became available for other application and settlement at the end of the preference period, which was 10:00 a.m. on July 8, 1963. Therefore, it concluded, the land embraced in Kalerak's claim was open to homestead settlement.

The State in its appeal to the Secretary contends that (1) the State relied on the Bureau of Land Management's interpretation of the applicable statute and regulations and that these interpretations can be relied upon and will be accorded great weight by the courts, (2) the State's selection, even if ineffective when filed, is to be considered as filed as of the time the land was opened to entry, and (3) the State can exercise the preference right given it by section 6(g) of the Statehood Act, *supra,* for land unavailable when the State files, to take effect when the land becomes available.

Kalerak, in opposition, maintains that the interpretation of the statute and regulations by the local Bureau office permitting blanket selections of lands whether available or not is erroneous and that no

selections could be made of lands withdrawn by P.L.O. 576 while it was in effect, that the State has not established an administrative interpretation of the statute which is controlling, and that an agreement between the local Bureau office and the State cannot bind or estop the Secretary from making his own independent examination of the merits of the local post office practice, that P.L.O. 3022 did not allow the State to file prior to the revocation of P.L.O. 576 and, finally, that the State, by making the selection on behalf of the city, has violated the prohibition in 6(g) of the Statehood Act, *supra,* which provides that:

> "The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State."

Although the issue on appeal to the Secretary has become the validity of the State's selection insofar as it covers lands formerly in P.L.O. 576, the issue on appeal to the Director in the *Kalerak* case was, and in the 11 other cases being considered here is, whether the notices submitted by the settlers and other appellants should have been accepted for recordation by the land office. The land office refused to accept the notices on the ground that the land described in each of them was segregated by the State selection from all applications and appropriations under the public land laws, including the mining laws. The pertinent regulation provides for the return of the filing fee required to accompany a notice of settlement claim "where the notice is not acceptable to the land office

for recording because the land is not subject to homestead settlement." 43 CFR 2211.9-1(d).[7]

As far as Kalerak and the other individual applicants are concerned, the issue is whether the land was subject to homestead settlement or to occupancy as a trade or manufacturing site. They contend that the State's selection is defective because it was filed prematurely, and, that, as a result, the State selection erected no obstacle to their attempts to establish their claims. In other words, they base their position upon the premise that a defective State selection cannot close the land selected to later appropriation.

Before examining the validity of the State's selection, we will first consider the soundness of the individual applicants' premise.

At the time the State first filed its selection the pertinent regulation described the effect of the State's action as follows:

> "Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office properly describing the lands as provided in § 76.9(a) (3), (4), and (5). Such segregation will automatically terminate unless the State publishes first notice as provided by § 76.17 within 60 days of service

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[7]Essentially the same provision is found in the homesite and headquarters site regulation, 43 CFR 2233.9-2(e), and in the trade and manufacturing site regulation, 43 CFR 2213.1-1(d).

> of such notice by the appropriate officer of the Bureau of Land Management."[8]

The regulation requires only that the State describe the lands properly to bring into play the segregative effect of its filing; it does not demand that the lands applied be available for filing, that they be eligible for selection, or that the selection be finally carried to patent. The regulation is merely a formal restatement of a rule that the Department has long followed. Keeping in mind that the land office treated the State selection as regular, accepted it, recorded it, and posted it, we find that the Department has held:

> "* * * the Department has invariably adhered to the rule of long standing that a selection, regular on its face when filed, * * * has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications * * *." *State of New Mexico* (on petition) 46 L.D. 217, 222 (1912), overruled on other grounds by Administrative Order, 48 L.D. 97, 98 (1921); Circular 768, 48 L.D. 172 (1921)."

In a later decision in a case involving a school land indemnity selection, in which after filing it developed that the State had tendered defective base land, the Department reviewed its prior rulings and concluded:

> "The effect of filing and allowance of a school land indemnity selection is to segregate the land

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[8] 43 CFR, 1964 rev., 76.16; now with minor changes 43 CFR 2222.9-5(b).

> selected, even though it may thereafter be found that there are defects which render cancellation necessary, and such a selection, even though erroneously received, segregates the land so that no other application therefore may be received or rights initiated by its tender." *State of Arizona,* 55 L.D. 249 (1935), syllabus.[9]

The Department made a particularly relevant application of the rule in *Youngblood v. State of New Mexico* (on rehearing), 46 L.D. 109 (1917). There the State had filed a school land indemnity selection for land on August 5, 1914. Youngblood alleged that he made a settlement on the land on February 6, 1916, and on February 12, 1916, he filed a homestead application. Thereafter when it was discovered that a portion of the land assigned as base had already been used in another selection, the Commissioner of the General Land Office (now Bureau of Land Management) cancelled the selection in part. The State then filed an application to amend in order to cure the defect.

The Department rejected Youngblood's homestead application and on rehearing stated:

> "In the former Departmental decision it was held that inasmuch as the selection was intact and *prima facie* valid at the time Youngblood filed his application, the land was not subject to such application, and, therefore, he gained no rights by filing the same. Furthermore, it was held that his

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[9]Accord: *Hodges v. Colcord,* 193 U.S. 192 (1904); *McMichael v. Murphy,* 197 U.S. 304 (1905); *Joyce A. Cabot et al.,* 63 I.D. 122 (1956); *R. B. Whitaker et al.,* 63 I.D. 124 (1956).

alleged settlement on the land under date of February 6, 1916, was likewise invalid because of the pending State selection, which segregated the land from settlement and entry.

"The decision complained of is in harmony with the recent Departmental decision of March 17, 1917, in the case of *California and Oregon Land Company v. Hulen and Hunnicutt* (46 L.D., 55), wherein it was held:

'Land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of local land office.' "

While the cited decisions do not involve the segregative effect of an application or entry improperly allowed because the funds applied for were unavailable, the rule is equally pertinent in that situation. In *Keating et al. v. Doll,* 48 L.D. 199 (1921), the Department held that a homestead entry allowed while the land was still withdrawn as part of a national forest segregated the land and required the rejection of applications filed later although the application for entry was prematurely filed prior to the date set for opening the land to entry and was otherwise defective.

These decisions made it abundantly clear that the lands covered by the State selection, whether or not it was defective, were not open to the initiation of claims by settlement or location and that all attempts to do so were invalid.

As the discussion below examines in greater detail, this rule is founded on the principle that all persons should have an equal opportunity to file for public land. If applications or settlements for lands noted on the public records as covered by a State selection which purports to segregate them were permitted, those who knew that the State selection was defective would have a marked advantage over those who relied upon the records to inform them whether or not the lands were available.

The just and equitable practice is the one followed by the Department. That is, while the State can gain no advantage by a premature or defective selection, a selection once filed and posted segregates the land until it is rejected and the public land records so noted. Any other course would undermine the Department's salutary policy of giving all applicants an equal chance to acquire public land.

Accordingly, the land office, as required by the pertinent regulation, *supra,* properly rejected the notices of settlement or occupancy.

With the claims of the individual applicants removed from the appeal, we may now consider the status of the State's selection.

As we have seen, the Director relied upon the general rule that an application made for land while it is withdrawn is invalid and does not become valid upon the revocation of the withdrawal. *Atherton Sinclair Burlingham et al.,* 71 I.D. 126, 128, 129 (1964); *Hunt v. State of Utah,* 59 I.D. 44 (1945). While this principle is sound and controlling in most similar

situations, it is necessary to examine both the reasons underlying it and Departmental practice to determine whether it requires the rejection of the State's selection here.

There are, it appears, two fundamental objections to allowing applications to be filed for lands before they are open to disposition. One is administrative. As the Department said in refusing to hold in suspense an oil and gas application for lands then unavailable for leasing:

> "* * * the rule is founded upon sound administrative practice. It prevents the public land records from being burdened with thousands of applications on which there is no possibility that action can be taken in the forseeable future. If one person can maintain an application for land not available for leasing several or a hundred can. [Footnote omitted.]
>
> In view of the hundreds of thousands of acres of public land which are not available for leasing for one reason or another, it is plain that the problem of administering premature offers would be considerable. * * *" *J. G. Hatheway et al.,* 68 I.D. 48, 52 (1961).

The second reason is equitable—that is, it avoids giving an applicant a preference right to which he has no right and assures to all the public equality of opportunity to file.

As the Department held in a case involving the rejection of an oil and gas lease offer for lands which the records showed to be in an existing lease which

had in fact terminated and the land then had been leased again and the second lease terminated, all without notation:

> "* * * [T]he overriding objective of the rule has been to assure to all the public equality of opportunity to file. This has been stated on many occasions. *Germania Iron Co. v. James,* 89 Fed. 811 (8th Cir. 1898), appeal dismissed, 195 U.S. 638; *George B. Friden,* A-26402 (October 8, 1952); *B. E. Van Arsdale,* 62 I.D. 475 (1955); *E. A. Vaughey, supra; M. A. Machris, Melvin A. Brown,* 63 I.D. 161 (1956).
>
> "This being the primary objective of the notation rule, to notify the public so that all will have an equal opportunity to file for land, it would be manifestly unfair to say that although there was an outstanding entry of record in the tract book of an oil and gas lease (Evanston 09156 (b)) covering the lands in secs. 2 and 11, no notation of termination of the lease was necessary to open the land to filing because, entirely outside the record, another lease (Wyoming 0257) had been issued and terminated following the termination of the first lease. This would give an unfair advantage to those who by chance knew of the issuance of the second lease. Those who relied on the tract book would have no notice of the second lease but would await the notation of termination of Evanston 09156(b) in the track book before filing for the land. It would be no answer to say that others could have ascertained the issuance of Wyoming 0257 by checking the serial register and plats. The fact is that the Department has said that the tract book is the record which will be determinative of whether

land is open for filing, and there is no reason why the public should have to resort to other records." *Max L. Krueger, Vaughan B. Connelly,* 65 I.D. 185, 191 (1958).

In an earlier case in which the Department considered the effect of State exchange applications filed for lands still in a temporary withdrawal, the State, while admitting that the selections were invalid and properly subject to rejection, asked that the selections be allowed to remain of record and that action be suspended until the withdrawal was revoked. In refusing to do so the Department held:

"The obvious purpose in asking for the suspension of these selections is to place the State in a situation where it will have a preferred right to exchanges over others under the provisions of section 8 of the Taylor Grazing Act, the assumption being made that, upon revocation of the withdrawal that now constitutes the bar to the selections, the rights of the State would attach *eo instanti* and shut out all subsequent applicants for the same land which might lawfully be filed under the same section of the act. In other words, these invalid selections would operate as segregation of the land applied for from other appropriation attempted when the land became subject to such filing. To so hold would be in direct conflict with the ruling in *Hendricks v. Damon* (44 L.D. 205), which has been cited and applied in cases without number in the administration of the public land law. There is nothing in section 8 of the Taylor Grazing Act which accords preference to the States in exchanges made thereunder, and no cir-

> cumstances appear in connection with these selections that might be deemed equities that could be made the basis of preference if and when the land becomes subject to exchanges. Action suspending these selections, for the purpose of effecting segregations in favor of the State the moment the land is released from the withdrawal of July 9, 1934, is tantamount to provisions in the order of restoration that exchanges under section 8 filed by the State shall be preferred over others that may lawfully be filed, a provision for which there is no statutory warrant. The applications here involved are void and do not become validated by the removal of the withdrawal." *State of Arizona,* A-18816, etc. (October 16, 1935).[10]

The question then is whether the considerations underlying the general rule are pertinent here and, if they are not, whether *cessante ratione legis, cessat et ipsa lex,* a different result should follow.

Examining the problem first again in its administrative aspects to ascertain whether the State's method imposes an undue burden on the land office, we note that the State is the only applicant whom the land office permits to file "prematurely." There is, thus, no likelihood that hundreds of other applicants will clutter the records with their filings.

Considering next the equitable aspects, we observe immediately that the State has a preference right to all land restored from withdrawal, granted to it by

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[10]Accord: *Hunt v. State of Utah, supra,* 46-47.

section 6(g) of the act of July 7, 1958, *supra*. Therefore, the fact that the State did get an opportunity to file on the restored land before anyone else is not inequitable or unfair or contrary to the statutory scheme. It merely advanced a bit the time in which the State could make its statutory preference known. Since the State has a statutory preference right, it is not inequitable to give it a chance to take advantage of it.

The force of the other argument—equality of opportunity to all to file—is dissipated by the same reasoning. If the statute intends that there be no equality of filing, then no individual is harmed if the State is allowed to file somewhat sooner than that general practice permits.

Therefore we conclude that in the circumstances there are no reasons of policy which require that the Department reject the State selection.

Furthermore, as we noted earlier, the State amended its application four times, twice within the preference right period and twice thereafter and all before publication and before Kalerak or any of the other appellants sought to establish any rights to the lands in their applications or settlements.

In such circumstances is the Department bound to insist on a new filing to replace the original premature one or can it accept the amendments as a demonstration of the State's interest in its selection and relieve it of the necessity filing anew? We believe that it can.

In *Hunt v. State of Utah, supra,* the Department in a somewhat similar situation adopted a solution relieving the State from the necessity of strict compliance with the regular procedure. After holding that the State gained no priority by a premature filing of an application to select certain land, it having no preference right to the land sought, even after restoration of the land, the Department gave effect to the State's selection thus:

> "It is possible, however, to treat the Commissioner's action in reinstating the [State's] application as a ruling that in the circumstances the filing of a new application would be an unnecessary formality, and that upon reinstatement the original application should be regarded as having effect only as of the time of such reinstatement and therefore being subject to such rights as Hunt might be deemed to have acquired by his prior [valid] application." (59 I.D. at 47.)

In other words, although the State's original and only application should have gained it nothing, the Department allowed it to be treated as though it had been filed as of the day the Commissioner purported to reinstate it.

So here the filing of an amendment to an application, in the absence of any reason not to so consider it, can be deemed the refiling of the original selection and the State's rights can be determined as though the original selection had been filed then. Since the first two amendments came within the preference period, the State, then, has exercised its preference

right and has established its claim to the selected lands.

In another case where a railroad had filed an indemnity selection list for lands held by the Department not to be open to such filing, but which were thereafter made available for selection by statute, the Department held that in the absence of intervening rights the original selection list could be treated as valid from the date the Commissioner of the General Land Office instructed the local officers to allow the selection, if otherwise proper, and to require the railroad to submit supplemental lists of tracts which were free from other claims and those to which adverse claims were asserted, despite the fact that a homestead application was filed by another before the railroad filed its supplemental lists. In affirming the validity of the railroad's selection the Department said:

> "The selection, in so far as the tracts free from adverse claim were concerned, was, in fact, treated, and properly so, in the nature of a new selection, effective and pending from and after the date of receipt of the Commissioner's letter by the local officers, but not prior thereto.
>
> It devolved upon the Department, as hereinbefore stated, to dispose of said lists under the law then in force and the action taken by the Commissioner was to relieve from suspension the railway selection. The land at the date the Commissioner took that action, being subject to appropriation by the railway company and the

railway company having at all times prior thereto manifested its desire and intent to select the same, it would have been a useless and burdensome requirement to compel the railway company to file new selection papers, practically a duplication of the selection then before the Department. The original selection could have been and was allowed as to the tracts free from adverse claim, as above stated, irrespective of the supplemental lists. The supplemental lists were in nowise a prerequisite of the taking of appropriate action on the original selection under the act of March 3, 1911, *supra*.

It is, therefore, held that movant, not being a party in interest at the date of receipt of the Commissioner's letter of September 30, 1913, by the local officers, will not be heard to question the Department's authority to relieve from suspension the pending railway selection, the disposition of which appears regular and in accordance with the law." *Trott v. Northern Pacific Ry. Co.*, 45 L.D. 193, 196 (1916).

Again we see that the Department need not insist upon a mere formality when there are no adverse rights to be considered. Here the State has at all times shown its intention to acquire the selected lands and it would have served no useful purpose to require it to file a duplicate of the application already on file.

Therefore we conclude that the amendments filed by the State during and after the preference right period were reaffirmations of the State's original selection and, in the circumstances, are to be treated as

though the State had refiled its original application at the time of the amendments.[11]

There remains Kalerak's contention that the State has alienated or bargained away its authority to make selections in violation of the prohibition in 6(g) of the Statehood Act, *supra.* There is no evidence to support this charge. The mere fact that the State is making a selection for land that the city desires does not mean that the State has sold or otherwise disposed of its authority to make this selection or any other.

In his supplemental pleadings on appeal Kalerak has raised several new issues. First, in rebuttal to an assertion of the State, he denies that the lands sought by Kalerak and others are necessary to protect the watershed. This issue is irrelevant, for the validity of the State's selection does not depend on the purpose for which it is made. The statute requires no particular purpose to justify a selection and none is required by the Department. The State's motivations are its own concern.

Next Kalerak urges that the United States District Court for the District of Alaska has already decided

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[11]It is also interesting to note that the practice of allowing a State to file premature applications so long as it did not prejudice any applicant filing on the day the lands became available is not of recent origin. For a time State selections filed prior to the filing of a township plat of survey were recognized as being filed on the proper date and in turn after all those present at the land office at the time of opening on the proper date. *State of California v. Koontz et al.,* 32 L.D. 648 (1904) ; 33 L.D. 643 (1905).

The Department soon formalized its practice by a regulation limiting the State to a period of three days prior to the regular opening day in which to submit premature selections. Regulations paragraph 12, June 23, 1910, 39 L.D. 39, 41 (1910). This provision was later omitted from the regulation, 43 CFR, 1938 ed., 270.12.

the case in *Taylor et al. v. Greater Anchorage Area Borough et al.,* No. A-91-65 Civ., October 15, 1965. This was an action by several homestead settlers or entrymen to enjoin the Borough from restricting the plaintiffs from full enjoyment of their rights under the homestead laws, or, specifically, from preventing the plaintiffs from access to or erecting structures on their homesteads. The Court issued a preliminary injunction effective only against the Borough which it said would "remain in effect until the Department of Interior has determined the dispute now appealed to it by the State of Alaska in the Kalerak case."

The Court emphasized that the injunction would not apply to either the State or Alfred P. Steger, described in the complaint as "Chief Records and Public Service, Anchorage District and Land Office, Bureau of Land Management."

While the Court did say that it found the State's original selection was "invalid against the rights of any others lawfully claiming rights under or against rights to said Federal Land," it also recognized that the issue was before the Secretary on appeal and that it would reexamine the matter when the Department had rendered its decision. In other words, it was not attempting to supersede the Secretary's duty to dispose of the appeal or to substitute its judgment for his. The Secretary remains free to examine the issues and to decide the case in accordance with his understanding of the law.

Finally, Kalerak has requested that an oral argument be held primarily to present his position that the

lands in his entry are not needed to protect the watershed with which the City of Anchorage is so concerned. As we have seen, the controlling issues in the case are legal, not factual, and the issue of whether all or any of the selected lands are part of the watershed is not really material to their resolution. The issues have been extensively briefed and oral argument would add little, if anything, to the written discussions. Therefore Kalerak's request for oral argument is denied.

Pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the Chief, Office of Appeals and Hearings, Bureau of Land Management, is reversed and the decisions of the land office refusing to record the several notices of occupancy or settlement are affirmed.

Edward Weinberg,
Deputy Solicitor.

## Appendix B

In The United States District Court
For The District of Alaska

No. A-35-66 Civil

Andrew J. Kalerak, Jr., Armand C. Spielman, Ronald L. Thiel, Ray McCubbins, Lawrence McCubbins, Carl B. Fiscus, C. H. Trombley, Arvil Gary Taylor, Pearl Gingerich,
Plaintiffs,

vs.

Stewart L. Udall, Secretary of Interior, State of Alaska,
Defendants.

## MEMORANDUM OF DECISION

The plaintiffs seek judicial review of the final decision of the Secretary of the Department of Interior filed January 20, 1966.

This court has authority to review the Secretary's decision under the Administrative Procedure Act, 5 U.S.C.A. § 1001, et seq.; *Adams v. Witmer,* 271 F.2d 29 (9th Cir. 1959); and *Denison v. Udall,* 248 F. Supp. 942 (D. Ariz. 1965).

The scope of the review authorized by the Administrative Procedure Act is whether the agency's action,

findings, and conclusions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law. *Cf. Coleman v. United States,* Opinion No. 20,227, United States Court of Appeals for the Ninth Circuit, June 21, 1966.

On January 8, 1963, while the land here involved was withdrawn from all forms of appropriation by virtue of PLO 576, dated March 29, 1949, 14 Fed. Reg. 1614, an application for selection of such land was filed with the Anchorage Land Office by the State of Alaska.

On April 8, 1963, the Secretary of Interior issued PLO 3022, 24 Fed. Reg. 3661, revoking the withdrawal established by paragraph (4) of PLO 576, *supra.*

During the 90 day period from April 8, 1963, until 10:00 a.m. on July 8, 1963, no selection of the lands involved in this case was made by the State. During the 90 day period the State did amend its application but such amendments merely added to the land described in the January 8, 1963, application and did not mention the land that is here in controversy.

On May 27, 1965, more than 22 months after the expiration of the preference period granted the State by section 6(g) of the Alaska Statehood Act, Andrew Kalerak, Jr., and others filed notices of location of settlement or occupancy claims with the Anchorage Land Office.

Subsequent to the date of the filing of Kalerak's location notice, the State top-filed a blanket selection, Serial No. 062905, over the same area as its first filing, including the area embraced by Kalerak's location notice.

On June 9, 1965, by a letter-decision, the Land Office held that Kalerak's location notice was unacceptable for recordation because the lands described in his claim were included in a valid selection by the State and therefore were segregated from all applications and appropriations under the public land laws. On appeal, the Office of Appeals and Hearings rejected the State's selection application insofar as it included lands described in paragraph (4) of PLO 576, *supra,* and reversed the Land Office decision insofar as it refused to accept the notice of location for recording.

On appeal to the Secretary of Interior the Secretary, on January 20, 1966, reversed the decision of the Chief, Office of Appeals and Hearings, Bureau of Land Management, and affirmed the decisions of the Land Office refusing to record the several notices of occupancy or settlement.

The Secretary in his decision of January 20, 1966, apparently relying on section 76.16 of 43 C.F.R., concluded that the selection filed by the State on January 8, 1963, which was accepted by the Land Office and posted on the public land record, segregated the land from all appropriations based on settlement and location so long as it remained of record, despite the fact

that the selected land was in a withdrawal at the time the State filed its selection.

In his decision the Secretary recognized the general rule that an application made for land while it is withdrawn is invalid and does not become valid upon the revocation of the withdrawal. However, he concluded that the rule against premature filings was adopted for administrative convenience and to insure equality of opportunity to file and where these considerations were not present, amendments to a premature application filed by the State during a statutory preference right period could thereafter be accepted as reaffirmations of the original filing and treated as though the State had refiled its original application at the time of the amendments.

The facts are not in dispute. The parties have each moved for summary judgment on the grounds that there is no genuine issue as to any material fact and that judgment should be entered as a matter of law.

The issues for determination are, (1) whether the application for selection filed by the State of Alaska on January 8, 1963, insofar as it embraced lands withdrawn by PLO 576, *supra,* was a valid selection in accordance with the provisions of the Act of July 28, 1956 (70 Stat. 709, 48 U.S.C.A. § 46-3b), and § 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), hereinafter referred to as the Act, and the regulations in 43 C.F.R. part 76; and (2) whether the State's application of January 8, 1963, segregated the land involved and effectively closed the land to subsequent appropriation.

The function of judicial review of administrative orders is a dispassionate and disinterested adjudication unmixed with any concern as to the success of any of the respective parties. *United States v. Morton Salt Co.,* 338 U.S. 632, 640-641 (1950).

The Act of June 25, 1910, (36 Stat. 847; 43 U.S.C.A. § 141) provides as follows:

> "The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and *such withdrawals* or reservations *shall remain in force until revoked by him or by an act of Congress.*" (Emphasis supplied.)

Executive Order No. 9337 of April 24, 1943, subsequently superseded by Executive Order No. 10355 of May 26, 1952, authorized the President to delegate to the Secretary of the Interior the authority vested in him by 43 U.S.C.A. § 141.

As stated above, by PLO 576, *supra,* the lands here in controversy were withdrawn from all forms of appropriation under the public land laws. Lands which have been withdrawn for a lawful purpose are not public lands and are to be regarded as excepted from subsequent laws, grants and disposals which do not specially disclose a purpose to include them. The withdrawal created by PLO 576 therefore remained in force until revoked in part by PLO 3022 on April 8, 1963.

The Alaska Statehood Act, supra, provided for the admission of the State of Alaska into the Union. Section 4 of the Act provided in part:

> As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, . . . .

Section 6(b) of the Act provides:

> The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within 25 years after the admission of Alaska into the Union, not to exceed 102,550,000 acres from the *public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection:* . . . (Emphasis supplied.)

Section 6(g) of the Act provides as follows:

> *Upon* the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than 90 days before the date on which it otherwise becomes effective, . . . *during which period* the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act . . . . (Emphasis supplied.)

It is readily apparent that section 6(b) and section 6(g) of the Act deal with two vastly different and distinct types or classes of land. Section 6(b) per-

tains to public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection, while section 6(g) pertains to lands which have been withdrawn from all forms of appropriation under the public land laws.

Congress in section 6(g) has stated in clear and unambiguous language that where the land has been withdrawn that *upon* the revocation of the order of withdrawal the State shall have not less than 90 days, *during which period* the State shall have a preferred right of selection. Where, as here, Congress has expressed itself in clear and unambiguous language it must be held to have meant what it plainly expressed.

Nothing is contained in the legislative history of the Act that would indicate that Congress intended that the State, with respect to withdrawn lands, should have any right of preference greater than that expressly set forth in section 6(g). U.S. Code Cong. & Ad. News, 1958, Vol. 2, pp. 2933-3009.

43 U.S.C.A. § 1201 provides that:

> The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specifically provided for.

Acting pursuant to this authority the Secretary prescribed certain regulations and published the same in the Federal Register on June 9, 1959, 24 Fed. Reg. 4657.

Section 76.15 of 43 C.F.R. provides in pertinent part as follows:

> (a) The acts of July 28, 1956 (see § 76.7), and July 7, 1958 (see § 76.11), provide that upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than 90 days before the date on which it otherwise becomes effective during which period the State of Alaska shall have a preferred right of selection under the acts of 1956 and 1958, . . . .

The language in this regulation is for all intents and purposes identical to that contained in section 6(g) of the Act. The words "upon" and "during which period" are words of common usage and understanding and have no obscure or hidden meaning.

Section 76.16 of part 43 C.F.R. in substance provides that lands desired by the State will be segregated from all appropriations when the State files its application for selection in the appropriate land office. This regulation is valid insofar as public lands of the United States in Alaska which are vacant, unappropriated and unreserved at the time of their selection are concerned. The regulation does not, however, apply to lands that are withdrawn from all forms of appropriation under the public land laws such as those involved in the present case. To so hold would be to add to section 6(g) something vastly different than that expressed or intended by Congress. This would be a distortion of congressional intent rather than an interpretation.

The regulations of an agency of the United States must be within the powers conferred by Congress. If the agency regulations go beyond what Congress has

authorized, they are void. *Federal Maritime Commission v. Anglo-Canadian Shipping Co.,* 355 F.2d 255 (9th Cir. 1964). To extend the segregative effect of section 76.16 of C.F.R. to withdrawn lands as well as to vacant, unappropriated and unreserved lands, would result in a preference right far beyond that contemplated or authorized by Congress in section 6(g) of the Act and would therefore be void.

There is no safer nor better canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses. *Cf. Easson v. C.I.R.,* 294 F.2d 653 (9th Cir. 1961).

It is evident that the Secretary of the Interior experienced no difficulty in understanding the meaning and intent of section 6(g) of the Act and section 76.15 of 43 C.F.R. On April 8, 1963, the Secretary issued PLO 3022, 28 Fed. Reg. 3661, revoking the withdrawal made by paragraph (4) of PLO 576.

PLO 3022, in pertinent part, provides:

> By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, it is hereby ordered as follows:
>
> 1. Public Land Order No. 576 of March 29, 1949, so far as it withdrew in paragraph numbered four thereof, an area of approximately 17,800 acres in Tps. 11 and 12 N., Rs. 1 and 2 W., Seward Meridian, for the protection of the water Supply of the city of Anchorage, is hereby revoked.
>
> * * * *
>
> 3. Subject to any existing valid rights and the requirements of applicable law, the public lands

> are hereby opened to settlement and to filing of such applications, selections, and locations as are allowable on unsurveyed lands in accordance with the following:
>
> a. Until 10:00 a.m. on July 8, 1963, the State of Alaska shall have a preferred right to select the lands in accordance with provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 CFR Part 76.
>
> * * * *
>
> 5. The lands will be subject to the operation of the public land laws generally, including location under the United States mining laws, beginning at 10:00 a.m. on July 8, 1963. . . .

Whether it is appropriate to say that PLO 3022 is the contemporaneous and practical interpretation given section 6(g) of the Act is of no consequence. The significance of PLO 3022 is the fact that therein the Secretary, in clear and precise language, set forth his understanding of the requirements of section 6(g) of the Act.

In *Udall v. Tallman,* 380 U.S. 1 (1965), the Supreme Court of the United States, in discussing the interpretation of executive and public land orders by the Secretary of the Interior, stated as follows (at p. 4):

> The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it. . . . (Citations omitted.)

The Court also stated (at p. 16):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." . . . . (Citations omitted.)

The Court quoted from its earlier decisions in holding (at pp. 16-17):

> "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" (Citation omitted.) When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.
>
> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." . . . . (Citation omitted.)

The Secretary's construction, interpretation or statement of his understanding of the express pur-

pose and intent of section 6(g) of the Act and the regulations in 43 C.F.R. part 76, as evidenced by PLO 3022, is the only reasonable one and is wholly consistent with the Act and regulations. It should therefore be controlling, as to the issues to be determined in this case, on this court and the subordinate officials of the Department of Interior.

Had the Secretary thought that section 76.16 of part 43 C.F.R. segregated the lands desired by the State from subsequent appropriation as of the time when the State filed its application for selection, he most assuredly would not, on April 8, 1963, have (1) ordered the lands opened to settlement subject to a 90 day preferred right of selection on the part of the State; (2) ordered that from April 8, 1963, until 10:00 a.m. on July 8, 1963, the State of Alaska had a preferred right to select the lands in accordance with the provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 C.F.R. part 76; or (3) ordered that beginning at 10:00 a.m. on July 8, 1963, the lands would be subject to the operation of the public land laws generally, including location under the United States mining laws.

Regardless of any reliance that the State may have placed on the Bureau of Land Management's interpretation of the statute and applicable regulations prior to April 8, 1963, no reason existed from that day forward to justify reliance on the practices, understanding, notices, agreements or interpretation

which existed between the City, the State and the Bureau of Land Management. Section 6(g) of the Act, section 76.15 of the regulations and the provisions of PLO 3022 specifically and clearly spelled out what steps the State was required to take to obtain a preferred right of selection and the precise period of time within which such right had to be exercised. In view of this, the State cannot seriously contend that it was not necessary for it to comply with the law and to exercise its preferred right of selection during the 90 day period afforded it between April 8, 1963, and 10:00 a.m. on July 8, 1963.

The court concludes as follows:

1. The application filed by the State on January 8, 1963, was not a selection of the lands in accordance with the provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 C.F.R. part 76.

2. The application filed by the State on January 8, 1963, was at the most only a request that paragraph 4 of PLO 576 be revoked and the application did not segregate the land from subsequent appropriation.

3. The State did not exercise the preferred right of selection afforded it by section 6(g) of the Act, section 76.15 of part 43 C.F.R. and PLO 3022.

4. The application filed by the State on January 8, 1963, was a nullity. The so-called amendments, or additional selections during the 90 day period, which did not embrace the lands selected on January 8, 1963, did not serve to validate the prior void selection.

5. Beginning at 10:00 a.m. on July 8, 1963, the lands became subject to the operation of the public land laws generally, including location under the United States mining laws.

6. Thereafter the plaintiffs' notices of location or occupancy were duly tendered for filing and should now be accepted for recordation.

7. The decision of the Secretary of the Interior filed on January 20, 1966, is not in accordance with law and, under the circumstances reflected by the administrative record, is arbitrary and capricious; in excess of statutory authority and limitations and short of statutory right; and without observance of procedure required by law, and should be set aside.

Accordingly, counsel for plaintiffs, within 15 (fifteen) days from the date of this memorandum of decision, shall prepare, serve and submit for the court's approval an appropriate form of summary judgment reversing the decision of the Secretary of the Interior filed January 20, 1966, and remanding this matter to the Manager of the Anchorage District Land Office for proper recordation on the records of the Land Office and for other action as is necessary to establish the prior claim of the plaintiffs herein for homestead entry and location and trade and manufacturing entry and location, and that such be accepted for recordation in such office and that the decision of the Chief of the Office of Appeals and Hearings of the Bureau of Land Management be affirmed in all regards.

Although certain assertions appearing in the record did not enter into the court's consideration of the

merits of the case, the court makes the following comments with reference thereto.

It is asserted that the State is being deprived of its preferred right by a mere technicality. It appears to the court that a more accurate statement would be that this right was lost by the failure of the State to exercise the right in the manner required by law.

It is also asserted that the State and City of Anchorage will lose irreplaceable watershed land on the basis of what might be considered, at the most, slightly irregular procedure. This is regrettable, if true, but it is not a factor which the court can properly consider in determining the issues presented. It would seem that if, in fact, the lands are necessary for an essential public use or purpose, the State, under its power of eminent domain, as it presently exists, or under appropriate legislative amendments, could acquire the land for watershed purposes.

Raymond E. Plummer
United States District Judge

Dated and entered: Oct 20 1966
Copies mailed to:
Messrs. Hughes, Thorsness & Lowe
Richard L. McVeigh, U. S. Attorney
Theodore E. Fleischer, Asst. Attorney General

Filed October 20, 1966,
J. M. Kroninger, Clerk.